require proof from the words themselves of any intention to produce such a result. Those words which would be necessary to support the argument of the defence need not be imported into section 3(1) of the Sedition Act.

Prima facie case

I am satisfied that the prosecution has, in the present case, discharged their evidential burden by adducing evidence of primary facts. At this point, I keep an open mind about various aspects of the case, in particular, with regard to whether or not a seditious tendency has been proved, and whether the words were in fact published in the spirit of the matters referred to in section 3(2) of the Act in that those words by themselves did not bear a seditious tendency. It is my duty at this stage to suspend judgment on them until all the evidence that either party wished to put before the court had been presented and counsel on both sides have addressed to me such arguments and comments on the evidence as they may wish to advance. Then only would I direct my mind to the question whether the guilt of the accused had been proved beyond reasonable doubt.

I therefore call upon Mr. Cumaraswamy to enter on his defence.

Order accordingly.

Solicitors: *Shook Lin & Bok.*

PUBLIC PROSECUTOR v. PARAM CUMARASWAMY (NO. 2)

[O.C.J. (Chan J.) January 25, 1986]

[Kuala Lumpur – Federal Territory Criminal Trial No. 39 of 1985]

Criminal Law and Procedure – Charge of sedition – Freedom under the law – Free speech and the constitutional provisions – Free speech and sedition – Sedition Act, 1948, ss. 3 & 4.

In this case the accused was charged with uttering seditious words, an offence under the Sedition Act, 1948. He was called for his defence (see [1986] 1 M.L.J. 512.) The accused made his defence. He said that in his open appeal he was urging the Pardons Board to exercise their powers fairly and uniformly so that people would not be made to feel that the Board were discriminating.

Held: (1) the words which were used to point out to the Pardons Board that the people should not be made to feel that the Board was discriminating between Mokhtar Hashim and Sim Kie Chon were not words which were likely to create discontent or disaffection among the people. Further it could not said that the statement was likely to create discontent among the people against Authority;

(2) taking all the circumstances into consideration the statement did not have a tendency to promote ill-will and hostility between the different classes of the population;

(3) the appeal was directed at the Pardons Board not at the Ruler, in this case, the Yang di-Pertuan Agong. Therefore there can be no question of the statement having a tendency to bring into hatred or contempt or to excite disaffection against the Yang di-Pertuan Agong.

Cases referred to:

(1) *Kedar Nath* v. *State of Bihar* A.I.R. 1962 S.C. 955.
(2) *Ramji Lal Modi* v. *State of U.P.* [1957] S.C.R. 860; A.I.R. 1957 S.C. 620. 622.
(3) *R.* v. *Collins* (1839) 3 St. Tr. (N.S.) 1149.
(4) *R.* v. *Lovett* (1839) 3 St. Tr. (N.S.) 1177.
(5) *R.* v. *Jones* (1848) 6 St. Tr. (N.S.) 783.
(6) *R.* v. *Aldred* (1909) 22 Cox. C.C.1.
(7) *R.* v. *Burdett* (1820) 1 Sc. Tr. (N.S.)1.
(8) *R.* v. *Caunt* (1947) 64 L.Q.R. 203.
(9) *Wallace-Johnson* v. *King* [1940] A.C. 231.
(10) *R.* v. *Sullivan* (1868) 11 Cox C.C. 44, 50.
(11) *R.* v. *John Miller* (1770) 20 St. Trials 869.
(12) *Burns* v. *Ransley* (1949) 79 C.L.R. 101.
(13) *Reg.* v. *Burns* (1886) 16 Cox C.C. 355.
(14) *Maru Ram* v. *Union of India* A.I.R. 1980 S.C. 2147.
(15) *Tonkin* v. *Brand* (1960) W.A. Rep. 535.
(16) *FAI Insurance Ltd.* v. *Winneke* [1982] A.L.J.R. 388.
(17) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.
(18) *O.S.K.* v. *Tengku Noone* [1983] 1 M.L.J. 179.

CRIMINAL TRIAL.

Mohamed Nor bin Hj Ahmad and *Ng Aik Guan* for the Public Prosecutor.

Raja Abdul Aziz Addruse, C.V Das, P. Royan, Manjeet Singh Dhillon and *Darryl Goon* for the defendant.

S. Theivanthiran for the Malayan Bar (watching brief).

R.R. Chelliah for the International Bar Association (watching brief).

Datuk Peter Mooney for the Bar Council of England and Wales (watching brief).

G.T.S. Sidhu for LAWASIA (watching brief).

Dato Wong Seng Chow for the *New Straits Times* (watching brief).

David Malcolm Q.C. for LAWASIA (observer).

Ooi Boon Leong for the International Commission of Jurists (observer).

Cur. Adv. Vult.

Chan J.: *Freedom under the law.* Raja Abdul Aziz, fair-minded lawyer that he is, has submitted with customary candour that "It is an irrefutable fact that the Sedition Act imposes restrictions on the right to freedom of speech and expression". He recognised that "the right to free speech and expression is not an absolute right. Nobody can deny that there must be certain restrictions".

Professor Harry Street (Freedom, The Individual and the Law (5th edn.) p.12) has this to say:

"This is how English law goes about its job of defining limits on our freedoms. The citizen may do as he likes unless he clashes with some specific restriction on his freedom. The law does not say: 'You can do that'; it says 'You cannot do this', which means that you can do everything else except that which it says you cannot do. Whenever such a prohibition is made, the reason will be that some other interest is rated more important than that freedom on which it impinges."

On personal freedom, Lord Denning on *Freedom under the Law* (the Hamlyn Lectures, first series) p.4 put it thus:

"The freedom of the individual, which is so dear to us, has to be balanced with his duty; for, to be sure every one owes a duty to the society of which he forms part."

(P.5):

"By personal freedom I mean the freedom of every law-abiding citizen to think what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons. ...It must be matched, of course, with social security, by which I mean the peace and good order of the community in which we live. The freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief. Every society must have the means to protect itself from marauders. It must have powers to arrest, to search, and to imprison those who break the laws."

His second lecture was on freedom of mind and conscience. This is how he put it (pp.35, 36):

"In the last lecture I was concerned with personal freedom ... Now I come to the freedom of his mind and of his conscience. This is just as important, if not more important, than his personal freedom. To our way of thinking it is elementary that each man should be able to inquire and seek after the truth until he has found it. We hold that no man has any right to dictate to another what religion he shall believe, what philosophy he shall hold, what shall be his politics or what view of history he shall accept. Every one in the land should be free to think his own thoughts – to have his own opinions, and to give voice to them, in public or in private ... and free also to criticise the Government or any party or group of people ...

Although this principle seems obvious to us it is on occasions prone to bring the individual into conflict with the State, or rather with the people who are in power in the State. This country, just as every country, preserves to itself the right to prevent the expression of views which are subversive of the existing constitution or a danger to the fabric of society."

Professor Harry Street sums up thus (*ibid*, p.312):

"The jurisprudential notion of liberty is the same, whether we have the Dicey Rule of Law or a Bill of Rights. For example, freedom of speech can never be a positive power to do something. Every legal system prescribes that you cannot do this and this: you must not defame another, you must not be seditious, you must not be obscene, and so on. The legal concept of liberty is that there are residual areas of great importance where man is free to act as he likes without being regulated by law."

In this country, just as in every country, there cannot be absolute freedom when we speak of fundamental rights (or human rights). In all common law countries, whether we have the Dicey Rule of Law or a Bill of Rights (as in the United States) or a written constitution, freedom is not an absolute right. Lord Denning calls it: freedom under the law. This telling phrase was coined by him in 1949; he was 'the first and true inventor' of it: see *The Family Story* pp. 177-8.

Free speech and the constitutional provisions

Raja Abdul Aziz in his submission did not say that the Sedition Act is unconstitutional. He did not say that. In fact what he did was to urge this court not to ignore or disregard the constitutional provisions concerning freedom of speech and expression. He said that this court will be committing an error if it were to consider the Sedition Act in isolation. But he did rely on *Kedar Nath* v. *State of Bihar*[1] which held that if "by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government" makes the offence of sedition under section 124A of the Indian Penal Code, then the section would be "unconstitutional in view of Art. 19(1) (a) read with cl. (2)" of the Indian Constitution. But it would not be unconstitutional if it could be read into the words of the section a "tendency to disorder or intention to create disturbance of law and order". This is how Sinha C.J. put it, at pp.968-969:

"(26) ... Any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity. If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Art. 19(1)(a) read with cl. (2)."

Why did Sinha C.J. import into the statutory offence of sedition in section 124A the further qualification that there must be a "tendency to disorder or intention to create disturbance of law and order"? Should the judge read into the section words which are not there? He tried to explain it in this passage, at p.968:

"(25) ... it is pertinent to observe that the security of the State, which depends upon the maintenance of law and order, is the very basic consideration upon which legislation, with a view to punishing offences against the State, is undertaken. ... This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. But the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, *in words which incite violence or have the tendency to create public disorder.*" (The emphasis is mine)

Article 19(2) of the Indian Constitution allows the State to impose reasonable restrictions on freedom of speech in the interest of, *inter alia*, security of the State or public order. In *Ramji Lal Modi* v. *State of U.P.*,[2] the validity of section 295A of the Indian Penal Code was challenged on the ground that it imposed restrictions on the fundamental right of freedom of speech and expression beyond the limits prescribed by cl. (2) of Art. 19 of the Constitution. In that case, the court observed:

"The question for our consideration is whether the impugned section can be properly said to be a law imposing reasonable restrictions on the exercise of the fundamental right to freedom of speech and expression in the interest of public order. It will be noticed that the language employed in the amended clause is 'in the interests of' and not 'for the maintenance of'. As one of us pointed out in *Debi Soren* v. *The State of Bihar*, A.I.R. 1954 Pat 254 the expression 'in the interests of, makes the ambit of the protection very wide. A law may not have been designed to directly maintain public order and yet it may have been enacted in the interests of public order."

From the passage which I have just read, we can clearly see that the constitutional provisions allow the State to impose restrictions *in the interest of* public order which has a wider ambit than *for the maintenance of* public order. This is because a law may not have been designed to maintain public order and yet it may have been enacted in the interest of public order. Similarly, a law may not have been designed to prevent incitement to violence and yet it may have been enacted in the interest of security. Put in another way, a law would still be in the interest of security or public order without having to make it a law for the prevention of violence or public disorder. Therefore, in my view, Sinha C.J. was quite wrong when he said:

"The freedom has to be guarded against becoming a licence for vilification and condemnation of the government established by law, *in words which incite violence or have the tendency to create public disorder.*"

Therefore section 124A of the Indian Penal Code is not beyond or outside the legislative power of Art. 19(2) of the Indian Constitution because it is a law made in the interest of security and public order. There is no requirement in Art. 19(2) of the Indian Constitution for the law to be made for the prevention of violence or public disorder before it can be said to be within the scope and power of cl. (2) of Art. 19. Section 124A clearly is within the limits of constitutional legislative power and there is no necessity to import the additional qualification desired by Sinha C.J.

But then Sinha C.J. went on to say (p.968):

"(25) ... The Court has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Art. 19(1)(a) of the Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, *inter alia*, security of the State and public order. We have, therefore, to determine how far the sections 124A and 505 of the Indian Penal Code could be said to be within the justifiable limits of legislation. If it is held, in consonance with the views expressed by the Federal Court in the case of 1942 FCR 38 : (A.I.R. 1942 FC 22), that the gist of the offence of 'sedition' is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State, in other words bringing the law into line with the law of sedition in England, as was the intention of the legislators when they introduced section 124A into the Indian Penal Code in 1870 as aforesaid, the law will be within the permissible limits laid down in cl. (2) of Art. 19 of the Constitution. If on the other hand we give a literal meaning to the words of the section, divorced from all the antecedent background in which the law of sedition has grown, as laid down in the several decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is not only within [*sic*] but also very much beyond the limits laid down in cl. (2) aforesaid."

As declared by the judge, he was in actual fact bringing the Indian law into line with the common law of sedition in England. This, according to him, was intended by the legislators when they introduced section 124A into the Indian Penal Code in 1870. The question is, was he right in so doing? Did the judge really know the intention of the legislators? Sinha C.J. had in fact pointed out that section 124A was not placed on the statute book until 1870 and that it was Sir James Stephen who had introduced it. This is what he said at p.960:

"S. 124A was not placed on the Statute Book until 1870, by Act XXVII of 1870. There was a considerable amount of discussion at the time the amendment was introduced by Sir James Stephen, but what he said while introducing the bill in the legislature may not be relevant for our present purposes. The section as then enacted ran as follows:

'124A. Exciting Disaffection –

Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a terms which may extend to three years, to which fine may be added, or with fine.

Explanation – Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the methods of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause.' "

Sir James Stephen, you will remember, was the judge whose definition of sedition appeared as Article 93 of the *Digest of the Criminal Law*. In fact section 124A which Sinha C.J. had reproduced in the passage which I have just read was the work of Stephen J. Nowhere in section 124 of the Indian Penal Code did Sir James Stephen include the further qualification of incitement to violence or inciting others to public disorders as an ingredient of the offence. As I have said earlier (see my decision when I called on Mr. Cumaraswamy to enter on his defence), "Although it may appear to be the position in English case law that incitement to violence or inciting others to public disorders is an essential ingredient of sedition, it is not so in a criminal code which has as its model Stephen's definition."

Sir James Stephen was the author of section 124A of the Indian Penal Code. He did not in drafting that section make incitement to violence or the tendency or the intention to create public disorders the gist of the offence of sedition. Nor did he make them the gist of the crime in his definition in Art. 93 of the Digest. And Art. 93 of the Digest was used as the model for the crime of sedition in the Criminal Code of the Gold Coast. So that when we look at section 124A of the Indian Penal Code or at the Criminal Code of the Gold Coast on sedition or our own Sedition Act (which I have previously said was modelled on Stephen's definition), we are merely looking at the definition of sedition as apprehended by Sir James Stephen, and not at English case law* which had developed separately from Stephen's definition. Stephen's definition has been codified as the law of the Gold Coast and of this country. And *Wallace-Johnson* v. *The King*[9] has laid down that since the law is contained in a code, [here I must borrow the words of Raja Abdul Aziz] "the court must look for the ingredients of the offence from the codified law and not import principles which have been established by English case law, and that, accordingly there cannot be imported into the offence (as created under the codified law) the additional ingredient of incitement to violence or inciting others to public disorder."

The view expressed by Sinha C.J. in the Indian Supreme Court in *Kedar Nath* cannot by any means be supported. In my judgment, the correct view is that as laid down by the Privy Council in *Wallace-Johnson*.

Free speech and sedition – who is to draw the line?

Lord Denning (*Freedom under the Law*, p.36) has said that "the line where criticism ends and sedition begins is capable of infinite variations. This is when the practical genius of the common law shows itself. The line between criticism and sedition is drawn by a jury who are independent of the party in power in the State". Lord Kenyon has quaintly said, "a man may publish whatever a jury of his countrymen think is not blamable."†

(At p.39) Lord Denning gave an example where the value of a jury is most clearly seen. He referred to the celebrated case of *John Miller*[11] who had printed in his paper *The London Evening Post* an open letter addressed to King George III by Junius. The government could not identify Junius, and so

* For incitement to violence, see: *R.* v. *Collins*[3]; *R.* v. *Lovett*[4]; *R.* v. *Jones*[5]; *R.* v. *Aldred*[6]. For conduct which tends to public disorder, see: *R.* v. *Burdett*[7]; *R.* v. *Collins, ante*; *R.* v. *Aldred, ante*; *R.* v. *Caunt*[8] (1947) reported in *An Editor on Trial* (Morecambe Press Ltd.) and noted in 64 L.Q.R. 203.

† The quotation is taken from the speech of Fitzgerald J. in *R.* v. *Sullivan.*[10]

it prosecuted Miller, the printer, for seditious libel in 1770. To quote Lord Denning (pp.39, 40) – "Lord Mansfield directed the jury that the question of libel or no libel was a matter of law for the judge, and that the jury was only to decide whether the paper was printed and published. Inasmuch as the paper was obviously printed and published, that direction was in effect a direction to the jury to find Miller guilty. But the jury stood out even against that great judge." The jury ignored what was virtually a direction to convict and found Miller Not Guilty. In 1791, Charles Fox proposed a Bill which was seconded by Erskine in the House of Commons which became the Libel Act 1972. The Act says that it was the jury, not the Judge, who has finally to decide on whether a libel was seditious. "A jury may always give a general verdict of guilty or not guilty: and no judge can take away that right from them. Parliament has so decided it." – said Lord Denning (at p.40).

In this country, we do not have a jury for the trial of sedition cases. Nor do we have Fox's Libel Act. But we do have independent judges. The line between criticism and sedition is drawn by a judge who is independent of the party in power in the State. Who can say which is better – jury or independent judge? This is what Lord Denning said about the independence of the judges as being the keystone of the rule of law (see *The Family Story*, at pp. 191-192):

"The keystone of the rule of law in England has been the independence of the judges. It is the only respect in which we make any real separation of powers. There is here no rigid separation between the legislative and the executive powers, because the ministers, who exercise the executive power, also direct a great deal of the legislative power of Parliament. But the judicial power is truly separate. The judges for nearly 300 years have been absolutely independent. And when I speak of judges, I include not only the High Court Judges, but also all the magistrates and others who exercise judicial functions. No member of the government, no member of Parliament, and no official of any government department, has any right whatever to direct or to influence or to interfere with the decisions of any of the judges. It is the sure knowledge of this that gives the people their confidence in the judges, and I would add also the chairmen of tribunals when they are independent of the executive, for then they too are judges. It does not depend on the name judge or chairman but on the substance. The critical test which they must pass if they are to receive the confidence of the people is that they must be independent of the executive."

These are fine sentiments and I think they are of universal application to all judges of the common law. They are as much applicable here. If judges are to receive the confidence of the people they must be independent of the executive.

In the Australian case of *Burns* v. *Ransley*[12] there was no jury nor was there Fox's Libel Act. The case was heard by a stipendiary magistrate. It came before the High Court of Australia upon a case stated by Mr Stanley Wilson, Chief Stipendiary Magistrate, Brisbane. In that case, an Australian communist said that "in a war with the Soviet Union, the Australian communists would fight on the side of the Soviet Union" or words to the like effect. It was held that the words were seditious. Latham C.J. said at p.108:

"It is not necessary in the present case to consider the common law as to sedition. The appellant was charged with an offence against the statute – uttering seditious words – section 24D. Section 24B provides that seditious words are words expressive of a seditious intention, and the case for the prosecution depends upon whether or not the words proved to have been uttered expressed the intention described in para. (b) or (d) of section 24A(1) (see *Wallace Johnson* v. *The King* [1940] A.C. 231)."

"That case was very much on the border line, as was shown by the fact that the High Court of Australia was evenly divided on the point." – said Lord Denning (*Freedom under the Law*, pp. 44, 45). Just as in *Burns* v. *Ransley*, in the present case the line between what is seditious and what is not seditious is drawn by a judge. In the United Kingdom, it is drawn by a jury. If the judges are independent, as they are in Australia and in this country, then there is nothing to fear – the rule of law is preserved. It is then the province of the judge to hold the balance between the competing interests.

The Sedition Act – section 3(2)

I have earlier when giving my decision for calling on Mr. Cumaraswamy to make his defence expressed my view on the meaning of section 3(2) of the Sedition Act. At this point, it is convenient to return to the words which I have used:

"The subsection specifies the circumstances or situations which are not seditious. Fine distinctions may have to be drawn between facts which justify the conclusion that there was a tendency to achieve one or more of the objects specified in section 3(1), and facts which are consistent only with the view that the tendency was no more than to do the acts or things mentioned in section 3(2). Provided that in doing any of the acts or things mentioned in section 3(2), the words used do not have the effect of achieving any of the objects specified in section 3(1)."

I stand by what I have said. But for the sake of clarity I shall restate my view on the subsection in another way. The words which seem to be giving difficulty to Raja Abdul Aziz are:

"3(2) Notwithstanding anything in sub-section (1) an act, speech, words, publication or other thing shall not be

deemed to be seditious by reason only that it has a tendency –

. . .

if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency."

Put in another way it means this:

Although it is seditious to utter words which have one or more of the tendencies stated in section 3(1), nevertheless words are not to be treated as seditious solely because they have a tendency which is no more than to do the acts or things mentioned in section 3(2), provided that the words used are not seditious in other ways.

The facts

The facts are not in dispute. Mr. Cumaraswamy is charged for having uttered seditious words at a press conference called by him on July 24, 1985 at the office of the Selangor and Federal Territory Bar Committee, Old High Court Building, Kuala Lumpur.

The statement reads:

"This is an open appeal to the Pardons Board by the Bar Council to reconsider the Petition of Sim Kie Chon for commutation of his death sentence.

Sim lost all his avenues through the courts. While the courts cannot review his case the Pardons Board can. *What is disturbing and will be a source of concern to the people is the manner in which the Pardons Board exercises its prerogative.* Though the prerogative of pardon is not justiciable before the courts yet surely it cannot be absolute under a system of government committed to justice and the Rule of Law. Even prerogatives must be exercised with some uniform, if not principles [*sic*], guidelines.

In the case of Mokhtar Hashim he was found guilty of discharging a firearm and killing another. Further, his trial was treated like a security case and tried under the Essential Security Cases Regulations 1975. No doubt he had a licence for his firearm. In Sim's case he was charged for merely in possession of a firearm. He had no licence. He was tried for an offence under the Internal Security Act which carries the mandatory death sentence. There was no evidence on record before the court that he was involved in any subversion or organised violence for which the Internal Security Act was enacted to prevent and suppress. Hence Sim should never have been charged under the Internal Security Act. On the strength of the evidence before the court if it was not for the legislative direction on the court to pass the mandatory death sentence no court, in the exercise of its discretion, would have sentenced him to death. This is a factor the Pardons Board could have taken into consideration.

On records before the courts Sim's case certainly was less serious than Mokhtar Hashim's case yet the latter's sentence was commuted. The people should not be made to feel that in our society today the severity of the law is meant only for the poor, the meek and the unfortunate whereas the rich, the powerful and the influential can somehow seek to avoid the same severity.

I therefore appeal to the Pardons Board to review Sim's Petition on humanitarian grounds and in the name of justice and good conscience and commute his sentence." (Emphasis supplied by the Prosecutor.)

At the presss conference many reporters were present. Mr. Cumaraswamy at first read out the statement to them. After that he distributed copies of the statement to all the reporters present. The next morning the story was carried by the local press. There is no dispute as to what had transpired. Mr. Cumaraswamy admits that he had called the press conference, that he distributed the statement to the local press, and that the story was carried in the newspapers the next day. It is plain that he did that deliberately and knowing that the statement made by him would reach a wide section of the public. He had hoped that by the action the Pardons Board would consider his appeal and it would eventually lead to the death sentence on Sim being commuted.

The prosecution called two members of the press. They were Miss Lakshmi Natarajan of the *New Straits Times* and Miss Chiew Mui Kheng of the *Nanyang Siang Pau,* a Chinese newspaper. They produced to the court the article which appeared in their respective newspapers on July 25, 1985. Miss Chiew also said that other reporters who were present at the press conference were from *The Star* (English), *Shin Min* (Chinese), *Thung Pau* (Chinese) and *Sin Chew* (Chinese).

The defence

Mr. Cumaraswamy was called to the English Bar on October 22, 1966. He is a practising member of the Malayan Bar since 1967, being admitted as an advocate and solicitor on October 10, 1967. He is presently the Vice President of the Bar Council, Malaya and a chairman of the Human Rights Sub-Committee of the Bar Council, Lawasia. The reason for calling the press conference and making the statement, according to him, was to bring to the notice of the Pardons Board his open appeal to the Board to review their previous advice in the hope that the Board would recommend the death sentence on Sim Kie Chon to be commuted to life imprisonment. He said that in his open appeal to the Board he was urging the Board to exercise their powers fairly and uniformly so that the people would not be made to feel that the Board were discriminating. He said that that was all that was intended in the appeal.

The verdict

To be seditious the words uttered must have a tendency to achieve one or more of the objects specified in section 3(1).

Section 3(1)(d): The question is, did the words uttered by Mr. Cumaraswamy have a tendency –

"3(1)(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State".

According to the paragraph, words which are capable of raising either discontent or disaffection among the people are seditious.

"Disaffection": I shall start with "disaffection". Disaffection, in the context of sedition, does not mean the absence of affection and regard, it means disloyalty, enmity and hostility: See per Latham C.J. in *Burns* v. *Ransley*,[12] at p.109. See also Dixon J. in the same case, at p.115:

"Disaffection is a traditional expression but it is not very precise. It means an estrangement upon the part of the subject in his allegiance which has not necessarily gone as far as an overt act of a treasonable nature or an overt breach of duty. It supposes that the loyalty and attachment to Authority, upon which obedience may be considered to depend, is replaced by an antagonism, enmity and disloyalty tending to make government insecure."

I can say at once that the statement did not have the tendency to incite or to raise disaffection among the people. In my judgment, the statement did not contain words which were capable of advocating or encouraging the people to disloyalty. There was no tendency in the words which could create antagonism, enmity and disloyalty among the people to make the government insecure.

"Discontent": I turn now to the word "discontent". Discontent means dissatisfaction. Fitzgerald J. said in *R.* v. *Sullivan*[10] at p.49:

"Every man is free to write as he thinks fit, but he is responsible to the law for what he writes; he is not, under the pretense of freedom, to invade the rights of the community, or to violate the Constitution, or to promote insurrection, or endanger the public peace, or *create discontent*, or bring justice into contempt, or embarrass its functions." (emphasis supplied.)

And at pp. 56, 57, the judge said:

"I concur with the counsel for the defendant that, if the law of [seditious] libel was carried out in the full strictness of its letter, it would materially interfere with the freedom of the press. Hence a great deal depends upon the forbearance of Government, the discretion of judges, and, above all, on the protection of juries. For instance, it is open to the community and to the press to complain of a grievance. Well, the mere assertion of a grievance tends to create a discontent, which, in a sense, may be said to be seditious. But no jury, if a real grievance was put forward, and its redress *bona fide* sought, although the language used might be objected to – no jury would find that to be a seditious libel. It might be the province of the press to call attention to the weakness or imbecility of a Government when it was done for the public good. How closely that trenches on the law of sedition; and yet such writing, when *bona fide*, would receive protection from a jury."

But there is no jury to try sedition cases in this country. It could be said that an English jury could feel it in their bones if an assertion of a grievance or complaint which tends to create a discontent is seditious or not. Also, they do not have to give reasons for their verdict. But a judge does not enjoy this luxury. A judge, on the other hand, has to give reasons for his decision. He has to say why he thinks a speech had a tendency to raise discontent among the people. If he did not think so, he has still to say why he thinks the speech did not have the tendency to raise discontent. Put in another way, the judge has to ask himself whether or not he is satisfied that the speech was likely to create discontent or dissatisfaction among the people.

Mr. Cumaraswamy says that his statement was an open appeal to the Pardons Board urging them to exercise their powers uniformly so that the people would not be made to feel that the Board were discriminatory. I quote from the statement:

"This is an open appeal to the Pardons Board by the Bar Council to reconsider the Petition of Sim Kie Chon for commutation of his death sentence.

Sim lost his avenues through the courts. While the courts cannot review his case the Pardons Board can. What is disturbing and will be a source of concern to the people is the manner in which the Pardons Board exercises its prerogative. ... Even prerogatives must be exercised with some uniform, if not principles [*sic*], guidelines."

"On records before the courts Sim's case certainly was less serious than Mokhtar Hashim's case yet the latter's sentence was commuted. The people should not be made to feel that in our society today the severity of the law is meant only for the poor, the meek and the unfortunate whereas the rich, the powerful and the influential can somehow seek to avoid the same severity."

Would those words be likely to create discontent or dissatisfaction among the people? This is how Fitzgerald J. asked of the jury in *Sullivan* at p.53:

"Without defining sedition further than for the purposes of this trial, I have to tell you if you, in your honest judgment, come to the conclusion that these publications, or any of them, are calculated and intended to ... create dissatisfaction, ... then they are seditious libels. I do not think I can put the matter plainer than that."

Where there is no jury, a judge has to ask himself if it is in his honest judgment that the statement was likely to create dissatisfaction among the people. If it is likely to do that then the statement is seditious. If in his honest judgment he does not think that the words were likely to create dissatisfaction among the people, then he has to find that the words are not seditious. In my judgment, I do not think that words which were used to point out to the Pardons Board that the people should not be made to feel that the Board was discriminating between Mokhtar Hashim and Sim Kie Chon are words which were likely to create discontent or dissatisfaction among the people.

Further, the statement was not likely to create such sentiments against Authority – a requirement which I feel is implicit in the definition of the words "discontent" and "disaffection". "Disaffection" means disloyalty, enmity and hostility against Authority. In the same way, "discontent" means dissatisfaction against Authority. Therefore, "to raise discontent or disaffection" among the people means to create discontent or disaffection among the people against Authority. Consequently, the assertion of a grievance or complaint which tends to create discontent must be directed at Authority for it to be seditious.

I do not think it can be said that the statement was likely to create discontent among the people against Authority. In my judgment, I do not think that there was such a feeling against Authority among the people. "Authority" in this regard means the Yang di-Pertuan Agong, the Rulers, the Government and the administration of justice. For instance, it is not sedition to incite or raise discontent or dissatisfaction among the people at the Tan Sri Ahmad Noordin Committee of Inquiry over their Report on the B.M.F. loan scandal, at the Singapore Government over the arrest of Mr. Tan Koon Swan, the president of the M.C.A., or at the decision of the referee in a football match.

Section 3(1)(e): But then would the statement be likely to promote feelings of ill-will and hostility between different classes of the population of Malaysia (paragraph (e) of section 3(1) of the Sedition Act)? I quote from the statement:

"On records before the courts Sim's case certainly was less serious than Mokhtar Hashim's case yet the latter's sentence was commuted. The people should not be made to feel that in our society today the severity of the law is meant only for the poor, the meek and the unfortunate whereas the rich, the powerful and the influential can somehow seek to avoid the same severity."

In that passage Mr. Cumaraswamy was pointing out to the Pardons Board that the people should not be made to feel that the Board was discriminating between "the poor, the meek and the unfortunate" and "the rich, the powerful and the influential". Mr. Cumaraswamy was certainly not trying to promote ill-will and hostility between the different classes of the population. In fact, he was urging the Pardons Board not to create the feeling or impression among the population that the Board was discriminating between the different classes.

In *Reg.* v. *Burns*[13], the headnote says:

"An intention to excite ill-will between different classes of Her Majesty 's subjects may be a seditious intention; whether or not it is so in any particular case, must be decided upon by the jury after taking into consideration all the circumstances of the case."

Where there is no jury, as here, the question whether or not there is a tendency to promote ill-will and hostility between different classes of the population in any particular case must be decided by a judge who is to take into consideration all the circumstances of the case. After taking all the circumstances of the instant case into consideration, I am clearly of the opinion that the statement did not have the tendency to promote ill-will and hostility between the different classes of the population.

Section 3(1)(a): And finally the prosecution has placed reliance on paragraph (a) of section 3(1) of the Act. It says:

"3.(1) A "seditious tendency' is a tendency –

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government"

Both *Mokhtar Hashim* and *Sim Kie Chon* are ESCAR cases. By reading regulation 29(1) of the Essential (Security Cases) (Amendment) Regulations 1975 and regulation 2 of the Essential (Security Cases) (Amendment) Regulations 1981 together, the Yang-di-Pertuan Agong when exercising the power to grant pardons, reprieves and respites or to remit, suspend or to commute

sentences under Clauses (1) and (2) of Article 42 of the Constitution shall act on the advice of the Pardons Board.

Raja Abdul Aziz has said that the Yang di-Pertuan Agong is obliged to accept the advice of the Pardons Board. He argues that since the Yang di-Pertuan Agong is bound by the advice of the Pardons Board, the Board is, therefore, subject to the supervisory jurisdiction of the courts. He relied on *Maru Ram* v. *Union of India*[14]; *Tonkin* v. *Brand*[15]; *FAI Insurance Ltd.* v. *Winneke*[16]; *Teh Cheng Poh* v. *Public Prosecutor*[17] and *OSK* v. *Tengku Noone.*[18] I agree with the submission to the extent that as the Board is not the King and since its function is only advisory the prerogative is not exercised by the Board.

Mr. Cumaraswamy's appeal was directed at the Pardons Board, not at the Ruler which in the instant case is the Yang di-Pertuan Agong. Therefore there can be no question of the statement having a tendency to bring into hatred or contempt or to excite disaffection against the Yang di-Pertuan Agong.

I find Mr. Cumaraswamy Not Guilty. I acquit and discharge him.

Order accordingly.

Solicitors: *Shook Lin & Bok.*

MOHAMED ABDULLAH TPE ABDUL MAJEED v. HABIB MOHAMED

[O.C.J. (Peh Swee Chin J.) January 7, 1985]

[Seremban – Originating Summons No. 31 of 1983]

Arbitration – Leave sought to enforce arbitration award – Validity of award of arbitrator can still be questioned at stage of application to enforce award – Point of illegality raised before Court – Arbitration Act 1952, s.27.

By a written agreement of May 21, 1976 the parties to the suit became partners of a restaurant. The agreement allowed each of the parties to have exclusive management and control of the said restaurant in alternate years and be entitled to keep for himself exclusively the profits and be liable for any loss of the said restaurant while under his exclusive control and management. In 1979 for some reason the defendant refused to hand over the business of the restaurant. Pursuant to an arbitration clause in the written agreement the court appointed an arbitrator who after a very long hearing delivered his award aforesaid, vindicating the rights of the plaintiff under the said agreement. The plaintiff sought the leave of the court to enforce the award. Leave was granted and against such leave the defendant appealed on the ground that the partnership agreement between the parties was unenforceable as it was tainted with illegality. This was due to the fact that the partnership business was on land held under a temporary occupation licence (T.O.L.) and carried on under the stall licence and both these licences were personal and non-transferable.

The plaintiff submitted that the point of illegality was not raised before the learned arbitrator or the High Court (when the said motion to set aside the award was heard and dismissed).

Held: (1) the validity of an award of an arbitrator can still be questioned at the stage of an application to enforce the award;

(2) the point of illegality affecting the validity of an award is a recognised ground for contesting the application for leave to enforce such an award. Even if it were not pleaded before the arbitrator or the High Court it would be the duty of the court to take a point of illegality even if the parties before it may not take it when this point clearly arises on the evidence;

(3) it is now settled that there is a clear distinction between transfer of rights under a T.O.L. and permission for the use of such rights under the T.O.L. The substance of the partnership agreement did not amount to a transfer of such rights under such T.O.L. or the stall licence but would merely amount to permission for the use of such rights under both licences. Therefore leave should be granted to the plaintiff to enforce the award.

[Editorial Note: The defendant has appealed to the Federal Court in F.C.C.A. No. 316 of 1984.]

Cases referred to:

(1) *Hee Cheng* v. *Krishnan* [1955] M.L.J. 103.
(2) *Murugesan* v. *Krishnasamy* (1957) 3 M.C. 93.
(3) *Union Nationale Des Co-operatives Agricoles De Cereales* v. *Robert Catterall & Co. Ltd.* [1959] 1 All E.R. 721, C.A.
(4) *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.* [1979] 2 M.L.J. 229.
(5) *Govindaraju* v. *Krishnan* [1962] M.L.J. 334.

ORIGINATING SUMMONS.

D.A. Devadason for the plaintiff.
Thara Singh Sidhu for the defendant.

Cur. Adv. Vult.

Peh Swee Chin J. : In this originating summons, the plaintiff sought leave of this Court to enforce an award of an arbitrator *viz.* Mr. Humfrey Ball, delivered by him on March 17, 1980 in the same manner as a judgment or order to the same effect.